Supreme Court of the United States

OCTOBER TERM—1949

No. 538

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* HAMPORTZOON CHOOLOKIAN,

Petitioner,

against

THE MISSION OF THE IMMACULATE VIRGIN and JOHN J. CORRIGAN, executive director, who is the person in charge thereof or having custody of the detained infants hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* HAMPORTZOON CHOOLOKIAN,

Petitioner,

against

THE NEW YORK FOUNDLING HOSPITAL and SISTER MARIE MADELEINE, superintendent, who is the person in charge thereof or having custody of the detained infant hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of Respondent Hilliard's Position

This brief by the respondent, Raymond M. Hilliard, as Commissioner of Welfare of the City of New York, represents the first statement on either side of this controversy which has been made by this Respondent since the incep-

tion of this litigation by writ of habeas corpus, issued out of the Supreme Court of the State of New York, New York County in October, 1947. Throughout the proceedings in the Supreme Court this Respondent took the position that the question as to whether the three children of Hamportzoon Choolokian should be released from his legal custody to their father in order that he might take them to Soviet Armenia, was one for determination by the courts of the State of New York. The Respondent Commissioner recognized the fact that the issues raised in this litigation were novel insofar as they involved the transfer of children in the custody of the Commissioner to a father who had been unable to provide a home for them in order that that father might take them to a foreign country. He also recognized the merit in the arguments raised by the Respondent institutions with respect to the character of the foreign country to which it was desired to take the children. The Respondent Commissioner, therefore, felt it best to leave for determination by the courts of the State of New York the question of whether such transfer of these children, who were the wards of the State, would be in their best interests.

The instant petition for a Writ of Certiorari to the Supreme Court of the United States, however, presents a question which was not contemplated by this Respondent at the time the Petitioner obtained his writ of habeas corpus. The Respondent did not then nor does he now believe that there is any federal question presented by the facts of this case requiring a determination by the Supreme Court of the United States. The Respondent Commissioner, therefore, joins with the Respondent institutions in opposing the petition for a Writ of Certiorari and respectfully asks this court to deny such Writ.

The Highest Court of the State of New York Has Determined the Only Material Issue in This Case, the Welfare of the Children. There Is No Federal Question Which Requires Determination by This Court

To the extent that any conflict of evidence may have been presented in this record, any such conflict, and all issues of fact, were resolved by the findings of the trial court and these findings were unanimously affirmed by the Appellate Division, First Department, of the Supreme Court of the State of New York and by the Court of Appeals of the State of New York.

The Respondent Commissioner is bound by and accepts these findings of the courts of the State of New York. These findings are:

1. That no consent was given by the Department of Welfare to the release of the children to their father (R. 387; R. 437).

2. That the father is not fit, competent or able to care for his children (R. 436).

3. That it would not be in their best interests to be taken by him to Armenia (R. 436).

It is the Respondent's belief that no federal question has survived the determination of the highest court of the State of New York. All the questions which were raised in this case are encompassed within the provisions of the Social Welfare Law of the State of New York. Section 383, subd. 1* of that law clearly provides that the parent

* Section 383, subd. 1 of the Social Welfare Law reads as follows:

"The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof, except upon consent of the court, public board, commission, or official responsible for the commitment of such child, or in pursuance of an order of a court or judicial officer of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in the custody of an authorized agency."

of a child remanded or committed to an authorized agency shall not be entitled to the custody of such child except upon consent of the official responsible for the commitment of the child, or for want of such consent, upon the order of a court of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. A welfare official is encompassed within the meaning of the phrase "authorized agency." (Section 371, subd. 10(b), Social Welfare Law.)

By Section 383 of the Social Welfare Law the duty is placed upon the court of making affirmative determination that the interest of the child will be promoted by a release to the parent and that the parent is fit, competent and able to maintain, support and educate the child. The courts of the State of New York have found that this father was not fit and that the interests of the children will be very poorly served by a release to his custody. They are, therefore, precluded by the statute from acceding to the father's request even though such request was made in connection with the exercise by the father of his right of expatriation.

No one has challenged the constitutionality of Section 383 or of any other provision of the Social Welfare Law of the State of New York.

With respect to the alleged treaty between the United States and the Soviet Union which is claimed to have been violated, there is nothing in the record to establish the existence of such a treaty. The Respondent Commissioner fully endorses the view set forth by the Respondent institutions in their brief, that the correspondence between the State Department of the United States and the Soviet Embassy relative to the return of persons of Armenian origin did not constitute either a treaty or any compact or agreement. The notes which were exchanged between the Soviet Embassy and the State Department (R. 383-5)

merely represent an expression by our State Department of existing law and of existing provisions available, without the need for further treaty or agreement, to persons of Armenian origin who wished to return to their native land.

The Respondent Commissioner has been from the very outset concerned with the one question upon which the proper discharge of his duty is based, to wit, how will the best interests of these children be served? He left this question to the courts and the highest court of the State of New York has made a final determination.

We respectfully submit there remains no other question which can, with any validity, be presented to this court.

The petition for Writ of Certiorari should be denied.

Dated: New York, February 10, 1950.

Respectfully submitted,

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